IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY KEITH WARNER, Appellant.	No. 37306-8-II UNPUBLISHED OPINION

Van Deren, C.J.—Rodney Warner appeals his conviction on one count of second degree assault with a deadly weapon for the May 18, 2007, assault of Brandon Pinkard. He argues that the trial court abused its discretion in failing to give a lesser included offense instruction for unlawful display of a weapon. He also argues that the State's evidence was insufficient to convict him of second degree assault against Pinkard because Pinkard did not testify that he felt imminent fear of bodily harm while Warner's accomplice was chasing him with a knife. We hold that there was sufficient evidence that Warner assaulted Pinkard but that the trial court abused its discretion in not giving the lesser included instruction on unlawful display of a weapon. We, therefore, reverse and remand for a new trial.

FACTS

On May 18, 2007, Chelsea Keefe; her husband, Brandon Pinkard; Gail Lewis; and four

others entered the pool room at the Cadillac Ranch Casino in Longview, Washington, and approached a pool table. A man began arguing with them over the pool table and a fight broke out. Melvin Stroud, an employee of the casino, observed the fight from a surveillance monitor and called 911. Keefe's group was asked to leave the casino.

Keefe, Pinkard, and Lewis exited the casino onto Commerce Street. At approximately the same time, Warner arrived at Commerce Street with his friend, James Wilcox, and his nephew, Randy Stout. A separate altercation took place between Keefe's group and Warner and Wilcox.

When police arrived, Warner and Wilcox entered the casino and placed two knives near the public telephones.[1] Upon exiting the casino, Warner and Wilcox were detained by police. Keefe pointed out Warner and Wilcox as the men who had assaulted her husband and told police that Warner had a knife. The police took statements from Keefe and Lewis. Pinkard did not give a statement.

Warner was arrested and charged with two counts of second degree assault with a deadly weapon. In count I, Warner was charged with the assault of Pinkard;[2] in count II, he was charged with assaulting Keefe. He was later also charged with one count of bail jumping, count III.

At trial, Longview Police Officer Ken Hardy testified that he received a call at approximately 10:30 pm on May 18, 2007, regarding a fight at the Cadillac Ranch Casino. When he arrived at Commerce Street, he observed Keefe and Lewis "out in the street, . . . pushing each other." Report of Proceedings (RP) at 41. Hardy separated the two women and then questioned

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[1] Casino surveillance cameras captured video images of Warner and Wilcox placing something at the telephone booth. Police later found two knives at the telephone booth.

[2] Count I was based on an accomplice theory, with Wilcox committing the assault against Pinkard and Warner acting as an accomplice.

Keefe, who "pointed to Mr. Warner and another subject, James Wilcox, as the people that assaulted her husband." Keefe told Hardy that "he had a knife." Hardy approached Warner and Wilcox and "patted them down for weapons, made sure they didn't have any knives on them." RP at 45. Hardy then entered the casino, where he recovered the casino's surveillance videotape and two knives.

Lewis testified that, after the fight in the pool room broke up, she overheard the man who had started the fight speaking on his cellular telephone, "saying that he was calling his buddies to come down here and help him."[3] RP at 66. Once outside the casino, Keefe saw two men, later identified as Warner and Wilcox. "And then I s[aw] a knife. . . . And then I screamed at my husband [Pinkard]. . . . [']Run, Brandon; he's got a knife.[']" RP at 108. Wilcox chased Pinkard down one side of the street and Warner chased Keefe down the other side of the street. Keefe saw both men holding knives.

As the group left the casino, Pinkard "felt a poke in [his] back, and [he] heard [his] wife [say], ['R]un, he's got a knife,['] and [he] took off running." Keefe was ahead of Pinkard as they ran down the street. Pinkard did not see "who was chasing [him] or who poked [him]." He did not actually see a knife, but "made the connection" between Keefe's warning that someone had a knife and the poke to his back, "and so [he] ran." RP at 91-92.

Lewis said that as the group walked down Commerce Street they passed two men. Keefe "grab[bed] [Lewis] by the arm" and told her that someone was chasing her with a knife. Lewis testified, "I turned around. I see him running with a knife; it's a big knife." RP at 67. She

[3] Lewis also testified that she overheard the man say, "[']I'm calling my friends right now. They're gonna come down and they're gonna . . . kick you.[']" RP at 64.

identified Warner as the man chasing her and Keefe.[4] Lewis did not see Pinkard being chased.

Warner and Wilcox were already in custody when Longview Police Officer Michael Berndt arrived. He questioned Warner, who told Berndt that "[h]e wasn't involved in the fight and had no affiliation with the knife or any knife being involved with the fight." RP at 137-38. Berndt also questioned Pinkard, who told him, "I'm not a victim" and who refused to give a statement. Berndt examined Pinkard and found that "he had a slice . . . he had a gash here that was -- the shirt was cut, obviously cut, and then he had maybe an inch by maybe an inch cut on his right side." RP at 143-44. Pinkard refused to allow the police to photograph the laceration. Keefe told Berndt that "Warner took a swing at [Pinkard] with a knife" but "never . . . that evening . . . did [Keefe] describe to [Berndt] a scenario where Mr. Warner and Mr. Wilcox are separately chasing her[] and [Pinkard] down Commerce [Street] . . . wielding knives." RP at 149-50.

Stout testified that he; his uncle, Warner; and Warner's friend, Wilcox, drove to the casino to give Stout's brother a ride home. The three men parked their car on Commerce Street. When they exited the car, "there was a guy across the street, he was yelling at us" and then the man, later identified as Pinkard, "started coming at us." Warner "got in front of [him] and stopped the guy" by "pull[ing] a knife out and show[ing] it to him." Warner told the man "['H]ey, you better back off.[']" There were two women with Pinkard and "[t]hey were yelling and screaming." Pinkard "went the other way" after Warner showed him the knife. RP at 165-67. Stout did not observe Warner chase Pinkard.[5]

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[4] In her statement, Lewis told police there were three men with knives. She did not describe a chase with knives, but stated that the "three men pulled a knife." RP at 79.

[5] At the close of Stout's testimony, Warner moved "to dismiss the alleged count of Assault

Warner testified that some of his younger relatives went to the casino following the scattering of his sister's ashes on May 18. The relatives called "[f]or a ride home, they'd been apparently in an altercation and they needed a ride home." RP at 186. Warner put two kitchen knives in the car because "[he] didn't know what trouble [he] was looking at" and the "[k]ids said they w[ere] in trouble." When he arrived at the casino, he saw "[c]haos in the street," so he took the knives out of the car. RP at 188-89.

> The knife was in my hand, in the side, both of them. And then when [Pinkard] started coming across, I got between him and Randy because him and Randy had words, and I got between them. And I go ["W]hoa, whoa, whoa, we ain't got a problem here.["] The knife was still at my side.

RP at 190. Warner showed the knives to Pinkard "as he got closer." "And then he kept coming and so then I had to hold [the knife] up . . . like this, in front of me." "His wife [ca]me up, "['H]ey, he's got a knife, he's got a knife[']and took him away and headed back towards the same way that they had come from." Warner recalled that Pinkard "was backed up and . . . [walked] back towards the Cadillac Ranch. And that's the same way we w[ere] going to find . . . my family inside the Ranch." RP at 191-93. Warner gave Wilcox a knife "[a]fter the altercation with [Pinkard]." RP at 190.

Warner requested a lesser included offense instruction for unlawful display of a weapon. The trial court declined to give the lesser included offense instruction because

> the person alleged to have assaulted Mr. Pinkard is not the Defendant, it's another individual. The Unlawful Display of a Weapon by the Defendant . . . factually would fit here if the Defendant were the one charged with actually assaulting Mr. Pinkard. But the allegation factually is that another individual did so, so I don't think the factual prong for a lesser included is met here.

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regarding Brandon Pinkerton." RP at 181. The trial court denied the motion.

RP at 223.

The jury found Warner guilty of two counts of second degree assault, counts I and II, and one count of bail jumping, count III. The jury returned special verdicts, finding that Warner was "armed with a deadly weapon at the time of the commission" of the assaults. RP at 266. Warner was sentenced to 34 months' confinement and 18 to 36 months' community custody.

Warner appeals.

ANALYSIS

I. Lesser Included Offense Instruction

A. Standard of Review

We review the adequacy of jury instructions that were based on an error of law de novo. *State v. Clausing*, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002). But where, as here, the trial court's refusal to give an instruction is based on the facts of the case, we review the refusal for an abuse of discretion. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

B. Evidence Supported Inference of Lesser Included Offense

Warner argues that "each of the elements of the lesser offense [of unlawful display of a weapon] is a necessary element of assault in the second degree with a deadly weapon and the evidence supported the inference that only the lesser offense was committed." He argues that "[t]he trial court's error requires reversal." Br. of Appellant at 10.

The State argues that "[t]he facts . . . do not support the less[er] included jury instruction" because Warner denied that Wilcox had a knife or that he displayed a knife. "Therefore, the lesser included jury instruction is not warranted because according to the [defend]ant, James Wilcox did

not have a weapon and did not unlawfully display a weapon." Br. of Resp't at 15.

In Washington, "a defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (citations omitted). The State concedes that unlawful display of a weapon meets the legal prong as a lesser included offense. Therefore, we need only decide whether the facts of this case support an inference that Warner only committed unlawful display of a weapon to the exclusion of second degree assault.

"The purpose of [the second prong] is to ensure that there is evidence to support the giving of the requested instruction." This factual showing must be "more particularized than that required for other jury instructions" and must "raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." This rule is intended to allow both parties to "have jury instructions embodying its theory of the case." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). We "view the supporting evidence in the light most favorable to the party that requested the instruction." *Fernandez-Medina*, 141 Wn.2d at 455-56.

Warner requested a jury instruction for the lesser included offense of unlawful display of

a weapon.[6] The trial court declined to give the instruction explaining that

> [t]he Unlawful Display of a Weapon by the Defendant, I think, factually would fit here if [Warner] were the one charged with actually assaulting Mr. Pinkard. But the allegation factually is that another individual did so, so I don't think the factual prong for a lesser included [offense] is met here because it's not this individual who's alleged to have actually assaulted him.

RP at 223.

Ample evidence was presented at trial to support an inference that Warner or Wilcox committed unlawful display of a weapon against Pinkard to the exclusion of second degree assault. Pinkard testified that he did not see Wilcox chasing him and Berndt testified that Pinkard stated at the scene that he was "not a victim." RP at 143. Lewis testified that she did not see anyone chasing Pinkard. Warner testified that he displayed the knives when Pinkard started coming toward him but that he did not chase him. Stout testified that he did not see Warner chase anyone. Keefe and Lewis's original statements to police indicated that Warner and Wilcox displayed a knife but did not indicate that there had been a chase.

Furthermore, the State's argument that "the facts do not support" unlawful display of a weapon, due to Warner's testimony that Wilcox did not have a knife, should fail. First, a defendant may be entitled to a lesser included offense instruction even when he denies being present at the crime scene. In *Fernandez-Medina*, our Supreme Court held that a requested jury instruction on a lesser included offense was appropriate even though Fernandez-Medina provided

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[6] RCW 9.41.270(1) defines unlawful display of a weapon:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

an alibi defense. 141 Wn.2d 457. Second, the "to convict" instruction for count I specifically stated that Warner could be convicted of Pinkard's assault for either the actions of another person under an accomplice theory or for Warner's own assault of Pinkard.[7] Therefore, the trial court's reasoning that the lesser included offense was inappropriate, since Warner himself was not charged with the actual assault, is flawed.

Here, the verdict forms did not ask the jury to identify under which theory it found Warner guilty of second degree assault against Pinkard; thus, it is possible the jury believed Warner's testimony that he, not Wilcox, threatened Pinkard with a knife. Furthermore, if the jury believed that Warner displayed the knife but did not chase Pinkard, without the lesser included offense instruction, the jury's only options were to convict Warner of second degree assault or to find him not guilty.

We hold that it was an abuse of discretion to refuse to include the lesser included offense instruction of unlawful display of a weapon.

II. Sufficiency of the Evidence

A. Standard of Review

We review challenges to the sufficiency of the evidence by asking whether, after viewing

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[7] The "to convict" jury instruction for count I, second degree assault with a deadly weapon, states:

> To convict the defendant of the crime of Assault in the Second Degree with a deadly weapon as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about May 18, 2007, *the defendant*, or one with whom the defendant acted as an accomplice, assaulted Brandon Pinkard, with a deadly weapon; and
>
> (2) That the acts occurred in the State of Washington.

CP at 77 (emphasis added).

the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence being equally reliable. *State v. Thomas*, 150 Wn.2d. 821, 874, 83 P.3d 970 (2004); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

B. Evidence Sufficient To Prove Second Degree Assault

Warner argues that "[r]eversal and dismissal is required because there was insufficient evidence that Warner or an accomplice assaulted Pinkard with a deadly weapon as charged in count I." Br. of Appellant at 15. He argues that there was insufficient evidence that Pinkard felt apprehension or imminent fear of bodily injury, an essential element of assault.

The State argues that "the jury could reasonably infer that James Wilcox intended to create apprehension and fear of bodily injury to Brandon Pinkard and that Brandon Pinkard had a reasonable apprehension and imminent fear of bodily injury." Br. of Resp't at 13. It argues that Pinkard's apprehension and fear was evident because Pinkard "[i]mmediately . . . took off running . . . did not look back, and left his wife behind" after he felt something poke his back and "heard his wife scream, ['R]un Brandon, he's got a knife.[']" Br. of Resp't at 12 (quoting RP at 108).

The State charged Warner with two counts of second degree assault with a deadly weapon

in violation of RCW 9A.36.021(1)(c).[8] In count I, the State charged Warner under an accomplice theory for Wilcox's assault of Pinkard. Under RCW 9A.36.021(1)(c), an individual commits second degree assault when he "[a]ssaults another with a deadly weapon." Washington recognizes three assault definitions: "'(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [battery]; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm [common law assault].'" *State v. Nicholson*, 119 Wn. App. 855, 860, 84 P.3d 877 (2003) (alterations in original) (quoting *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988)), *overruled on other grounds by State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

Here, jury instruction 11 stated that "[a]n assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP at 79. Jury instruction 7 defined accomplice liability as follows:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.

[8] Under RCW 9A.28.020(1), "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime."

> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

CP at 75.

Pinkard testified that he felt something poke his back and then heard Keefe yell, "['R]un, he's got a knife,[']and [he] took off running." RP at 91. Pinkard did not know who chased him or if he saw a knife. He stated that the "poke" to his back "wasn't . . . to inflict injury," he ran because he assumed there was someone chasing him, even though he did not know if there actually was someone chasing him. RP at 93.

Keefe testified that she saw Wilcox with a knife and that she saw him chasing Pinkard with the knife. She testified that Wilcox chased Pinkard down one side of the street and that Warner chased her down the other side of the street. She testified that she "only s[aw] [Wilcox] for a second." RP at 110. Although Keefe originally told police that Warner "pulled a knife on her husband" and did not mention a chase or the existence of more than one knife,[9] we leave credibility determinations to the trier of fact. RP at 54; *Walton*, 64 Wn. App. at 415-16.

Viewing the evidence in the light most favorable to the State, we find that a rational jury could have found Warner guilty of second degree assault, as charged in count I. Although Pinkard did not see anyone chase him with a knife, he felt a poke and immediately began running after his wife told him someone had a knife. To experience "apprehension," a person need only

[9] At trial, Keefe testified that the written statement was incorrect and that she had been drinking when she wrote the statement.

have a "perception; comprehension; [or] belief" that they are in imminent danger of bodily harm. Black's Law Dictionary 110 (8th ed. 2004). Keefe's testimony, combined with Pinkard's reaction to the poke and Keefe's warning, provided sufficient evidence for a rational jury to find that Warner was an accomplice to Wilcox in committing second degree assault against Pinkard. Warner's insufficiency argument fails.

Nevertheless, we reverse Warner's conviction on count I, second degree assault with a deadly weapon, for failure to instruct the jury on the lesser included charge of unlawful display of a weapon and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Bridgewater, J.

Penoyar, J.